UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD LANDINGHAM, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER CH-0752-96-0922-I-1 DATE: FEB 19 1999

Edward Landingham, Calumet City, Illinois, pro se.

JoAnne Jacobsen, Bloomingdale, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed an untimely petition for review of the August 30, 1996 initial decision that dismissed his petition for appeal as withdrawn. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and FORWARD the appeal for redocketing as a new appeal and for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a preference-eligible City Carrier. On July 19, 1996, the agency removed him for failure to maintain a regular attendance record as evidenced by eight unscheduled absences. Initial Appeal File (IAF), Tab 1. On August 19, 1996, the Board received the appellant's timely filed pro se petition for appeal of his removal, in which he asserted, inter alia, that his absences were due to his poor health and job-related injuries, and that the removal action was "not right" under these circumstances. *Id.* However, on August 30, 1996, the Board received a letter from the appellant stating that he had learned that he could "only be represented by the Merit System or by [his] union" and that he wished "to cancel any proceedings until decisions [were] made by [his] union and management in reference to [his] position." IAF, Tab 3. Accordingly, the administrative judge issued the August 30, 1996 initial decision dismissing the appellant's appeal as withdrawn. The initial decision became the final decision of the Board on October 4, 1996. IAF, Tab 4.

¶3 On March 20, 1998, the appellant filed an apparent request for review of a May 2, 1997 arbitrator's award denying his grievance of his removal. He asserted, inter alia, that he was not given "all the facts pertaining to my appeal rights." Petition for Review (PFR File), Tab 1 at 3. He included a copy of the award with his submission. *Id.*, Appellant's Ex. A. In the award, the arbitrator stated that a grievance over the appellant's removal "was lodged on or about May 10, 1996," that the grievance proceeded through the negotiated steps of the National Agreement and on to arbitration, and that an arbitration hearing was held on April 11, 1997. *Id.* at 2.

¶4 On March 27, 1998, the Clerk of the Board notified the appellant that, if he intended his submission to be a petition for review of the August 30, 1996 initial decision, it was untimely and he must present good cause within 15 days of the notice for waiving the filing deadline. PFR File, Tab 2. The agency moved to

dismiss the appellant's petition. *Id.*, Tab 3. The appellant responded to the Clerk's notice on April 27, 1998, asking for an extension of time to file his response. *Id.*, Tab 4. On May 6, 1998, the Clerk notified the appellant that the Board considered his March 20, 1998 filing to be a late-filed petition for review and denied his request for an extension to supplement the petition for review. *Id.*, Tab 5.

ANALYSIS

The Board will consider the appellant's April 27, 1998 response to the Clerk's show-cause notice.

¶5 The appellant's evidence shows that the Clerk's March 27, 1998 timeliness notice, which required response within 15 days, was sent to 141 E. 104th Street, Chicago, Illinois, instead of 141 W. 104th Street, Chicago, Illinois, and that it was returned to the Board with the notation, "no such number." PFR File, Tab 4 at 4, 6. Although the postmark on the return is illegible, the appellant asserts in his sworn declaration that he did not receive the (re-sent) copy of the Clerk's March 27, 1998 notice until April 18, 1998. PFR File, Tab 4 at 2. Because the appellant submitted his response only 9 days after his receipt of the notice, the Board accepts it as a timely filed response to the Clerk's show-cause notice. *See, e.g.*, *Birdsong v. Department of the Navy*, 75 M.S.P.R. 524, 527 (1997) (Board considered agency's two-day late response to petition for review because Clerk had sent notice of deadline for filing response to wrong address).

The Board lacks jurisdiction over the appellant's submission as a request for review of the arbitrator's award.

¶6 Despite the Clerk's characterization of the appellant's March 20, 1998 submission, we find that it may also be viewed as a request for review of the arbitrator's award instead of a petition for review of the initial decision. The appellant's submission states that the agency erred in arriving at its decision and identifies the date of that decision as May 2, 1997, that is, the date of the

arbitrator's award. It further proceeds to identify alleged errors in the arbitrator's award. PFR File, Tab 1 at 1-2. As the agency points out, however, a preference-eligible Postal Service employee may file both a grievance and a Board appeal from the same action, but does not have the right to Board review of an arbitrator's award. *Marjie v. U.S. Postal Service*, 70 M.S.P.R. 95, 98 (1996); PFR File, Tab 3 at 3. Thus, the Board lacks jurisdiction over the appellant's submission to the extent that it is a request for review of the arbitrator's award.

The appellant has not established good cause for waiving the filing deadline for his March 20, 1998 submission as an untimely new petition for appeal or a request to reopen his appeal on the basis that he was misinformed concerning his rights to file a Board appeal and a grievance.

¶7 Where a Postal Service employee withdraws his Board appeal to pursue the negotiated grievance-arbitration procedure, and then files a petition for review challenging the dismissal of his appeal as withdrawn, the Board will treat his petition as a new appeal or a request for reopening the previously dismissed appeal. *Zuhlke v. U.S. Postal Service*, 74 M.S.P.R. 401, 403-04 (1997). The appellant asserts that he was misinformed by his union that he could not pursue a Board appeal and a grievance at the same time. *See, e.g.,* PFR File, Tab 4 at 2.

¶8 The agency's decision letter, however, specifically informed the appellant that he had "the right to file an MSPB Appeal and grievance on the same matter." IAF, Tab 1 at 4. Thus, the untimeliness of the "new appeal" was not due to the appellant's misinformed withdrawal of his original appeal, but was due to his decision to pursue the grievance procedure. Pursuit of a grievance in another forum does not constitute good cause for the untimeliness of an appeal. *Zuhlke*, 74 M.S.P.R. at 404. Moreover, absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn because an appellant now wishes to proceed before the Board. *See, e.g., Wolfe v. Department of the Army*, 77 M.S.P.R. 175, 179, *review dismissed,* 152 F.3d 945 (Fed. Cir. 1998) (Table). Thus, the appellant

has not established good cause for waiving the filing deadline of the "new appeal" or for reopening his appeal on this basis.

The appellant may establish that his March 20, 1998 submission is a timely new petition for appeal under 5 C.F.R. § 1201.154(b)(2) on the basis that he was not informed of his right to file a discrimination complaint.

¶9 In his March 20, 1998 submission, the appellant asserted, inter alia, that he was not given "all of the facts pertaining to my appeal rights." PFR File, Tab 1 at 3. In response to the Clerk's show-cause notice, he submitted evidence indicating that he had filed a formal complaint of race and disability discrimination with the agency on October 14, 1997, concerning his removal. PFR File, Tab 4 at 34. Because this evidence implicates the Board's jurisdiction over this appeal, we have considered it. *See, e.g., Cimilluca v. Department of Defense*, 77 M.S.P.R. 256, 258 (1998) (the issue of jurisdiction over an appeal is always before the Board and may be raised at any time).

¶10 Under 5 C.F.R. § 1201.154(b)(2), an appellant who files a timely formal complaint of discrimination with his agency may appeal the action to the Board after 120 days have elapsed and the agency has not issued a final decision. *See, e.g., Conover v. Department of the Army*, 78 M.S.P.R. 605, 613 (1998). Here, the record evidence indicates that the appellant did not file a timely formal complaint of discrimination because he did not initiate contact with the agency equal employment opportunity (EEO) counselor within 45 days of the effective date of his removal, that is, July 19, 1996. *Id*. at 613-14; PFR File, Tab 4 at 35. Moreover, the Equal Employment Opportunity Commission (EEOC) has indicated that an agency's acceptance and investigation of a complaint with no finding on the issue of timeliness is not a waiver of the time limit for initiating contact with an EEO counselor. *Conover*, 78 M.S.P.R. at 614.

¶11 However, the agency's decision letter notifying the appellant of his removal, while informing him of his right to file an appeal with the Board, did not inform him of any right he might have to file a discrimination complaint with the agency

of his removal and of the consequences of such an election. *See* IAF, Tab 1 at 3-4. Under similar circumstances, the Board has deferred to EEOC's determinations that the appellants, therefore, did not make valid elections between the Board appeal process and the EEO process. *See Gomez-Burgos v. Department of Defense*, 79 M.S.P.R. 245, ¶¶ 9, 10 (1998); *Zuhlke*, 74 M.S.P.R. at 405.

¶12 The evidence does not show that EEOC has specifically made such a determination in this case. However, especially considering the appellant's pro se status and the confusion regarding his appeal rights, we find that the appellant should be given the opportunity to submit evidence concerning any EEO proceedings to the administrative judge. *See Gomez-Burgos*, 79 M.S.P.R. ¶ 10; *Conover*, 78 M.S.P.R. at 614; *cf. Wolfe*, 77 M.S.P.R. at 180 (the Board declined to waive the petition for review filing deadline of the initial decision dismissing the appellant's appeal as withdrawn because the agency informed the appellant in the removal decision notice that she could elect to file either an EEO complaint or a Board appeal and that the first filing would be considered an election to proceed in that forum). If the administrative judge finds that the appellant timely filed with the Board under 5 C.F.R. § 1201.154, she shall adjudicate the merits of the appellant's appeal.

¶13 The appellant, as a preference-eligible, can appeal his removal to the Board under 5 U.S.C. § 7513(d). As explained in ¶ 6 above, the Board cannot review the arbitrator's award, that is, the Board will not determine whether the arbitration decision was correct. The arbitration decision may nonetheless come into play. If the administrative judge determines that there is good cause for the appellant's untimely filing of the appeal, she should consider whether the appellant is precluded from relitigating some or all of the issues decided by the arbitrator. *See, e.g., Fedon v. U.S. Postal Service*, 78 M.S.P.R. 657 (1998); *see also Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988); *Newberry v. U.S. Postal Service*, 49 M.S.P.R. 348, 352-53 (1991).

ORDER

¶14 We FORWARD the appeal to the regional office for redocketing as a new appeal and for adjudication, including a determination on the timeliness of the appeal. *See Gomez-Burgos*, 79 M.S.P.R. ¶¶ 10, 11; *Conover*, 78 M.S.P.R. at 614.

FOR THE BOARD: _____
Robert E. Taylor
Clerk of the Board

Washington, D.C.